IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1951

No. 345

THE STATE OF WASHINGTON and E. C. HUNTLEY, E. W. ANDERSON, and DINSMORE TAYLOR, as the TAX COMMISSION OF THE STATE OF WASHINGTON, *Cross-Petitioners,*

v.

THE B. F. GOODRICH COMPANY.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON AND BRIEF IN SUPPORT THEREOF

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v.

THE B. F. GOODRICH COMPANY.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The cross-petition of the State of Washington and of the members of the Tax Commission of the State of Washington respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

The State of Washington and the members of the Tax Commission of the State of Washington seek a review of that portion of a judgment of the Supreme Court

of Washington holding that the imposition of the State's business and occupation tax upon respondent, The B. F. Goodrich Company, as measured by certain types of its sales to purchasers in the State of Washington, is violative of the Commerce Clause of the United States Constitution (Art. I, sec. 8, Cl. 3), and holding that an injunction should issue to restrain its collection. The same judgment, in ruling with respect to the tax as measured by other types of sales by The B. F. Goodrich Company, held the tax to be properly imposed and not violative of any federal constitutional right.

The B. F. Goodrich Company, respondent herein, has filed or will timely file in this Court a petition for writ of certiorari to review that portion of the judgment adverse to it. The certified transcript of the record of the proceedings below are filed in that cause, and the same have been duly printed. This petition is in the nature of a cross-petition for a writ of certiorari in which your petitioners seek review by this Court of the remainder of that judgment. The record on file in *The B. F. Goodrich Company v. State of Washington, et al.* is hereby adopted as the record for the consideration of this cross-petition.

The Washington business and occupation tax is imposed pursuant to Chapter 180, Washington Laws of 1935, as amended, known as the "Revenue Act of 1935." (See Appendix A for pertinent portions thereof.) It is a gross receipts type of tax levied upon every person engaged in business in the State for the privilege of so engaging in business (see section 4). It is not a "pass-on" tax levied for the ultimate burden of the consumer in the sense that some state's retail sales taxes are imposed upon the business but are passed on as an economic (but not legal)

burden directly to the retail purchaser (see section 14). The State of Washington has a retail sales tax imposed upon retail purchasers to be collected by the seller and remitted to the State (Title III, Chapter 180, Washington Laws of 1935, as amended).

This is a test suit brought to determine the validity of the Tax Commission's Rule 193, "Interstate and Foreign Commerce," (R. 11) as it pertains to the business and occupation tax. That rule requires that all persons engaged in business in Washington *include* within the measure of that tax the gross proceeds of all sales in which possession of the merchandise is transferred to the purchaser within the State of Washington, even though the goods are shipped by the seller from out-of-state stocks by common carrier directly to the purchaser in Washington. It *excludes* all sales having the converse of these facts: where the goods are shipped out of the State of Washington and pass into the possession of the buyer outside Washington. Prior companion suits brought to test this rule were unsuccessful due to a state court ruling that the terms of the taxing statute discriminated against interstate commerce. *Columbia Steel Co. v. State of Washington*, 30 Wn. (2d) 658, 34 Wn. (2d) 700, certiorari denied, 339 U. S. 903; *Weyerhaeuser Sales Co. v. Tax Commission*, 30 Wn. (2d) 947, 34 Wn. (2d) 979, certiorari denied, 339 U. S. 903. The discriminatory feature of the statute was amended August 1, 1950 (section 2, Chapter 5, Washington Laws of 1950, Ex. Ses.); and the discrimination has been ruled to have been removed by the Supreme Court of Washington in its opinion in this cause (R. 41, 45). We are thus here concerned only with the application of the taxing statute to various types of sales having certain interstate characteristics.

The facts, which have been stipulated (R. 31), may be summarized as follows:

Respondent B. F. Goodrich Company, a New York corporation (R. 31), engages in the business of manufacturing and selling merchandise of various kinds, particularly rubber products (R. 32). Respondent performs no manufacturing activities in Washington, but does make sales in Washington of its manufactured products at both wholesale and retail levels (R. 32). Respondent's sales in Washington may be divided into three general classifications:

> "(1) Purely local sales, where the product sold by plaintiff is delivered from its local stocks in Washington to the purchaser in Washington;
>
> "(2) Sales for delivery out of Washington, where the product sold by plaintiff is delivered from its local stocks in Washington by common carrier to purchasers at destinations outside of Washington;
>
> "(3) Sales for delivery into Washington, where the product sold by plaintiff is delivered from factories and stocks maintained by it in states other than Washington by common carrier to purchasers at destinations in Washington." (R. 32-33)

We are here involved with wholesale sales of the third classification. Within that classification respondent's sales fall into six categories, denominated in the stipulation of facts as Class A, B, C, D, E, and F sales (R. 35). The business and occupation tax was assessed against respondent by the Tax Commission of the State of Washington as measured by the gross proceeds of its wholesale sales of these six classes completed during August, 1950 (R. 34). Respondent petitioned the Tax Commission for a correction of assessment (R. 34, 20), but the petition was denied (R. 34, 25). Respondent commenced this action to enjoin petitioners from collecting the tax as set forth in

the assessments (R. 1, 9). The facts were stipulated (R. 31). The trial court upheld the tax as to Classes A, B, C, D, and E sales, but granted the injunction as to Class F sales (R. 38). The Supreme Court of Washington reversed the trial court with respect to Class E sales, citing *Norton Company v. Department of Revenue*, 340 U. S. 534, as controlling authority, and ordered that injunctive relief be granted as to the Class E sales (R. 59).

We are here involved only with Class E and Class F sales, described as follows:

> "*Class E sales*—Sales by the Hood Rubber Division in the amount of $13,147.06. Orders for flooring material are mailed by Washington purchasers directly to a San Francisco, California, office where such merchandise is stocked or to the main division office in Watertown, Massachusetts. No flooring material is stocked in Washington. The merchandise is shipped from Watertown or San Francisco by common carrier, F.O.B. Watertown or San Francisco, directly to the purchaser at a destination in Washington. Plaintiff allows freight (i.e. the purchaser deducts the freight charge from the invoice price) on all sales over 200 pounds. Billings are made from point of shipment.
>
> "*Class F sales*—Sales by the Hood Rubber Division to the J. C. Penney Company in the amount of $36,094.92. These sales are a result of a contract negotiated between the Hood Rubber Division main office at Watertown, Massachusetts, and the home office of the J. C. Penney Company at New York City, New York. Shipments are received by Washington J. C. Penney outlets as a result of orders placed by them with their home office in New York, which office transmits the orders to Hood Rubber's main office in Watertown. The merchandise is shipped from Watertown by common carrier, F.O.B. Watertown, directly to the J. C. Penney locations in Washington which have been designated by the New York office. Plaintiff allows freight (i.e. the purchaser deducts the freight charge from the invoice price) on all sales

over 200 pounds. Billings are made from Watertown to the J. C. Penney home office in New York." (R. 37)

The issue is whether to tax respondent as measured by the gross proceeds of these sales imposes an undue burden on interstate commerce in view of the rule of the Tax Commission that no sale for shipment out of Washington—regardless of the presence or absence of local incidents—is included in respondent's tax.

JURISDICTIONAL STATEMENT

It is contended that this Court has jurisdiction to review the judgment under section 1257(3) of Title 28, United States Code.

The judgment is final, being rendered by the Supreme Court of Washington, the highest court of the State in which a decision could be had.

The judgment was entered on June 26, 1951 (R. 59). Thus, this petition is filed within ninety days of the entry of the judgment as required by section 2101(c), Title 28, United States Code.

The record is in the hands of the Supreme Court of Washington, the remittitur having been recalled (R. 61). Accordingly, the writ should be directed to that court.

The Washington statute involved is Title II, Chapter 180, Washington Laws of 1935, as amended. (See Appendix A.)

The federal constitutional issues are properly preserved. The facts are not in dispute, and the sole issue involved has at all times in the progress of the action been whether the tax as applied violated the Commerce Clause of the United States Constitution (R. 8-9), and

was, therefore, deductible under section 12(f) of the statute, which reads as follows:

> "Sec. 12. In computing tax there may be deducted from the measure of tax the following items:
>
> * * *
>
> "(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States."

The action has at every stage been decided upon this federal question. The issue involving the federal question was framed in the following manner:

Pursuant to its duly promulgated rule (R. 11), petitioner Tax Commission served a notice of deficiency in payment of tax upon respondent (R. 18, 19). Respondent filed a petition for correction of assessment with the Tax Commission raising the federal question (R. 20), and an order was duly entered denying the petition after consideration on the merits (R. 25). Respondent commenced this action in the Superior Court of the State of Washington for Thurston County to enjoin collection (R. 1), alleging in its complaint as the sole ground for relief that the tax was prohibited by the Commerce Clause (R. 8-9). After answer and the entry of a stipulation of facts, judgment was entered by the trial court deciding these federal constitutional questions (R. 38). Appeal and cross-appeal were taken to the Supreme Court of Washington (R. 39, 40), in which those rulings were assigned as errors. In the opinion of that court, the federal questions were the sole issues considered (R. 41).

A federal question of substance is involved. The tax with which the action is concerned is imposed upon all persons engaged in business in the State of Washington

(see section 4, Chapter 180, Washington Laws of 1935, as last amended by section 1, Chapter 5, Washington Laws of 1950, Ex. Ses.), and will be asserted against thousands of business firms which engage in business in two or more states, including Washington, and sell merchandise for shipment from an out-of-state point directly to the purchaser in Washington. The State of Washington has been attempting for six years to secure a final exposition by the Supreme Court of the United States upon the Tax Commission's ruling concerning the imposition of this tax upon such businesses measured by such interstate sales. See *State of Washington v. Columbia Steel Company*, 339 U. S. 903, and *Tax Commission v. Weyerhaeuser Sales Company*, 339 U. S. 903. Decision of the question rests solely upon an interpretation of the Commerce Clause of the United States Constitution as applied to the Washington business and occupation tax on a set of facts of common occurrence.

QUESTION PRESENTED

Does the Washington business and occupation tax imposed upon a firm engaged in various business activities in the State impose an unconstitutional burden upon interstate commerce by the inclusion in the measure of the tax the receipts from sales in which the merchandise is shipped across state lines by common carrier directly to the purchasers in the State of Washington, and in which sales the delivery of possession to the purchaser is the only event occurring in Washington?

REASONS FOR ALLOWANCE OF THE WRIT

1. The federal question, of substance and not heretofore determined by this Court, as to the imposition of a business and occupation type of tax measured by gross

receipts of sales in Washington, was decided by the Supreme Court of Washington in favor of respondent by holding that the proceeds of sales in which possession passed to the purchaser in Washington after interstate shipment from the seller were not taxable if the particular sale was not preceded by any direct activity by the seller's local office or employees, stating that it was "compelled" (R. 51) to so hold under *Norton Company v. Department of Revenue of Illinois,* 340 U.S. 534.

2. The decision below is in conflict with principles established in *International Harvester Company v. Department of Treasury,* 322 U. S. 340, upholding a gross receipts type of tax under substantially similar circumstances, and it particularly conflicts with the following decisions on states sales and use taxes which were held in the *Harvester Co.* case to be equally applicable to the imposition of a gross receipts tax: *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33; *Nelson v. Sears, Roebuck & Co.,* 312 U. S. 359; *Nelson v. Montgomery Ward,* 312 U. S. 373; *General Trading Co. v. State Tax Commission,* 322 U. S. 335. The *Harvester Co.* case was not even cited in the *Norton Co.* case, confusing the states which impose a gross receipts type of tax as to the present status of taxation of firms whose sales transcend state lines.

3. The question involved is one of general public importance.

4. If the petition for writ of certiorari is granted in *The B. F. Goodrich Company v. State of Washington, et al.* to review the remainder of the judgment here involved, being that part favorable to your petitioner and adverse to the respondent, the writ should issue in this cause to permit full review of the judgment, and to pre-

sent the federal question of state gross receipts taxation in a greater variety of sales transactions.

WHEREFORE, your petitioners pray that a writ of certiorari issue directed to the Supreme Court of Washington to the end that the portion of the judgment below which is adverse to petitioners may be reviewed and determined by this Court, and that the said judgment be reversed by this Court, and for such further relief as the Court may deem proper.

DATED this 18th day of September, 1951.

STATE OF WASHINGTON, and E. C. HUNTLEY, E. W. ANDERSON, and DINSMORE TAYLOR, as the TAX COMMISSION OF THE STATE OF WASHINGTON.

By: SMITH TROY,
Attorney General of the State of Washington,

C. JOHN NEWLANDS,
Assistant Attorney General of the State of Washington,

Counsel for Cross-Petitioners.

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THE B. F. GOODRICH COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Washington (R. 41) is not yet printed in the official reports.

JURISDICTION

The jurisdiction of this Court is invoked under section 1257(3) of Title 28, United States Code. The Supreme Court of Washington in this case, and particularly in the portion of the judgment appealed from, has decided a federal question of substance not heretofore determined by this Court and has decided it in a way probably not in accord with decisions of this Court in analogous cases.

Judgment was entered below on June 26, 1951, (R. 59) and the petition is filed within ninety days thereof as required by section 2101(c) of Title 28, United States Code. A word may be necessary to explain the time differential between the entry of the opinion on May 15, 1951 (R. 41), and the entry of the judgment on June 26, 1951. Decisions of the Supreme Court of Washington are embodied in judgments, and it is that judgment which is presented to this Court for review. *Puget Sound Power & Light Co. v. City of Seattle*, 264 U. S. 22. An *en banc* opinion of the Supreme Court of Washington is not a final decision until thirty days after its entry in cases where no prior departmental opinion has been filed; no such departmental opinion was filed in this case; and where a petition for rehearing is filed within the thirty day period, the decision does not become final, and judgment is not entered, until the petition is disposed of. See section 5, Chapter 24, Washington Laws of 1909. In this case a petition for rehearing was timely filed (R. 54), and was denied on June 26, 1951 (R. 59). Thus, the decision became final on that date, and judgment was on that date entered (R. 59).

A complete statement of the proceedings below leading up to the final judgment of the Supreme Court of Washington is contained in the preceding petition.

STATEMENT OF THE CASE

Respondent is engaged in extensive business activities in Washington, its sales running into millions of dollars annually (R. 33). It concedes its liability for and pays the Washington business and occupation tax as measured by its sales in which all activities are performed in Washington. It has contended that no tax is due with

respect to any sale involving shipment of the merchandise to the purchaser by the movement thereof across state lines, either into or out of Washington.

The petitioner Tax Commission, following the decisions of this Court in *Adams Mfg. Co. v. Storen,* 304 U. S. 307, and *Freeman v. Hewit,* 329 U. S. 249, holding that Indiana as the state of origin could not impose its gross receipts tax on such interstate sales, and in *Allied Mills, Inc. v. Dept. of Treasury,* 318 U. S. 740, and *International Harvester Co. v. Dept. of Treasury,* 322 U. S. 340, holding that Indiana as the state of destination could impose its tax on such interstate sales, promulgated its Rule 193, "Interstate and Foreign Commerce," adopting those rulings (R. 11). Accordingly, Washington does not assert its tax in any case involving a shipment out of state, regardless of the amount of local activity in such sale by the seller. On the other hand, Washington asserts that the tax should be paid in every case where a firm engaged in business activities in the state consummates a sale by shipment into Washington, even though a particular sale has no local incidents other than the transfer of possession to the buyer in Washington.

Thus, a formula of apportionment is established and imposed which roughly approximates the tax liability of a firm such as respondent having selling activities of many sorts in the state. No multiple burden on interstate commerce can exist. The taxpayer does not pay beyond its fair share of taxes.

The court below, feeling "compelled" by *Norton Company v. Dept. of Revenue,* 340 U.S. 534 (R. 51), held that the tax as imposed upon those particular local sales which had no local incidents (Class E and Class F) vio-

lated the Commerce Clause. That portion of the judgment should be reviewed and reversed by this Court.

The facts have been stipulated (R. 31). A more detailed summary of the facts is set out in the preceding petition.

SPECIFICATION OF ERRORS

The Supreme Court of Washington erred in holding that the inclusion of the gross proceeds of Class E and Class F sales in the measure of the Washington business and occupation tax imposes a burden upon interstate commerce which violates the United States Constitution. The Court erred in affirming the portion of the judgment of the trial court which enjoined collection of the tax measured by Class F sales; and the Court erred in reversing the judgment of the trial court dismissing the action as to Class E sales and ordering injunctive relief to be granted with respect to such sales. The Court erred in holding that *Norton Company v. Department of Revenue,* 340 U. S. 534, was controlling upon the facts and statute involved in the present action.

ARGUMENT

In its opinion the Supreme Court affirmed the granting of the injunction to restrain collection of the tax measured by Class F sales and ordered an injunction to issue with respect to Class E sales solely because of the Commerce Clause of the United States Constitution (R. 50). It felt "compelled" (R. 51) to so hold by the decision of this Court in *Norton Company v. Dept. of Revenue of Illinois,* 340 U. S. 534, involving the Illinois retailers' occupation tax.

Whether the tax may be imposed upon a firm having extensive and varied selling activities in a state measured

not only by its local sales but also by a portion of its interstate sales is a federal question of substance, as proved by the numerous occasions upon which this Court has consented to review the taxes of the various states as levied upon business firms engaged in activities having interstate characteristics. This cause should be reviewed not only to settle the issue of taxation by the State of Washington under its concept of this Court's decisions, but also for the general clarification of the matter for the various states and for taxpayers throughout the nation who carry on business by sales for delivery across state lines.

It has been thought—and particularly so by the Washington State Tax Commission—that this Court ascribed to the theory that the state of origin (or the state of the seller) absolutely could not assert its tax upon sales for delivery of the merchandise across state lines, but that the state of destination (or state of the buyer) could tax the seller measured by the proceeds of any such sales. This rule was evident when the Court rendered its decision in *International Harvester Co. v. Dept. of Treasury,* 322 U. S. 340, following *Adams Mfg. Co. v. Storen,* 304 U. S. 307, and *per curiam* affimance in *Allied Mills v. Dept. of Treasury,* 318 U. S. 740. *Freeman v. Hewit,* 329 U. S. 249, was an affirmance of that doctrine, the state of the seller there being forbidden to impose its gross receipts tax even though there were no incidents of sale performed by the person taxed which occurred outside the taxing state, this decision being for the obvious purpose of preserving such taxation for the state of the buyer.

Norton Company v. Dept. of Revenue, 340 U. S. 534, has thrown the states' concept of this Court's doctrine into doubt. They are mindful of the reiteration of the state-

ment that interstate commerce must pay its own fair share of the state tax burden, yet if the *Norton Company* decision is intended to alter the above-stated doctrine, there will exist an area in which business can be done in a state entirely free of *any* state taxation. If taxation of the sale by the state of the buyer hinges upon the number of local incidents, and the state of the seller can never tax, then there will be sales free of taxation if no local activities on a particular sale are performed in the state of the buyer. No state will tax that firm; it will then have a competitive advantage over a firm selling locally or over another firm selling for shipment in interstate commerce but which engages in local activities with respect thereto. States will lose tax without being able to tax in the converse situation where it is the seller's state.

The balance established by earlier decisions should not be lost. If every buyer's state may tax and every seller's state may not tax there will never be any double taxation of the same sale. The states and the business firms will each have an easy, workable test by which taxation is determined.

On the other hand, if this Court disapproves of that form of rough apportionment, but still adheres to the principle that interstate commerce must pay its own way, it should make itself clear. The *Norton Co.* case appears to be a change which would affect gross receipts taxes, yet the *Harvester Co.* and *Allied Mills* cases, involving the same facts, are not even cited.

It is petitioner's position that the *Norton Co.* decision has no application to a gross receipts type of tax, such as the Washington business and occupation tax, and that the court below was not "compelled" by that decision to re-

strain the collection of the tax as to the Class E and Class F sales. This position is based upon a belief that the *Harvester Co.* case continues as authority for gross receipts taxation of all sales by the state of the buyer.

If a writ of certiorari issue to review the remainder of the judgment herein in *The B. F. Goodrich Co. v. State of Washington, et al.*, a writ should particularly be issued in this cause to allow a full review of all the six types of sale for interstate shipment into Washington which are conducted by respondent. Those types are so variant as to provide a broad and clear review of the whole subject of state taxation of those making sales in interstate commerce.

This cross-petition for certiorari should be granted.

DATED this 18th day of September, 1951, at Olympia, Washington.

Respectfully submitted,

SMITH TROY,
Attorney General of the State of Washington,

C. JOHN NEWLANDS,
Assistant Attorney General of the State of Washington,

Counsel for Cross-Petitioners.

Appendix A

REVENUE ACT OF 1935

[Chapter 180, Laws of 1935[1]]

TITLE II. BUSINESS AND OCCUPATION TAX[2]

[1]Remington's Revised Statutes of Washington, § 8370-1 *et seq.*
[2]As amended and in effect during the period covered by this action.

SEC. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

(a) Upon every person engaging within this state in business as an extractor; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, extracted for sale or for commercial or industrial use, multiplied by the rate of one-quarter of one per cent;

The measure of the tax is the value of the products, including by-products, so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the state;

(b) Upon every person except persons taxable under paragraph (2) of subsection (d) below engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, manufactured, multiplied by the rate of one-quarter of one per cent;

The measure of the tax is the value of the products, including by-products, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state;

(c) Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one per cent;

(d) (1) Upon every person engaging within this state in the business of buying wheat, oats, corn and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax herein imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of one one-hundredth of one per cent;

(d) (2) Upon every person engaging within this state in the business of manufacturing wheat into flour; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour manufactured, multiplied by the rate of one-eighth of one per cent;

(e) Upon every person except persons taxable under subsection (d) (1) above engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent;

(f) Upon every person engaging within this state in the business of: (1) printing, and of publishing newspapers, periodicals or magazines; (2) building, repairing or improving any publicly owned street, place, road, highway, bridge or trestle which is used, or to be used, pri-

marily for foot or vehicular traffic; as to such persons, the amount of tax on such business shall be equal to the gross income of the business multiplied by the rate of one-quarter of one per cent;

(g) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c), (d), (e) and (f) above; as to such persons the amount of tax on account of such activites shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale" as defined herein. (Section 1, Chapter 5, Washington Laws of 1950, Ex. Ses.)

SEC. 5. For the purposes of this title, unless otherwise required by the context:

* * *

(b) The word "person" or word "company," herein used interchangeably, means any individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, co-partnership, joint venture, club, company, joint stock company, business trust, municipal corporation, corporation, association, society, or any group of individuals acting as a unit, whether mutual, co-operative, fraternal, non-profit or otherwise and the United States or any instrumentality thereof;

(c) The word "sale" means any transfer of the ownership of, title to, or possession of property for a valuable

consideration and includes any activity classified as a "sale at retail" or "retail sale" under subsection (d) of this section. It includes conditional sale contracts, leases with option to purchase, and any other contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It shall also be construed to include the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

The term "casual or isolated sale" means a sale made by a person who is not engaged in the business of selling the type of property involved.

(d) The term "sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated or imprinted) other than a sale to one who purchases for the purpose of resale as tangible personal property in the regular course of business or for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale. The said term also means every sale of tangible personal property to persons engaged in any business which is taxable under section 4 (f) (2) and section 4 (g) hereof.

The term "sale at retail" or "retail sale" shall be construed to include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (1) the installing,

repairing, cleaning, altering, imprinting or improving of tangible personal property of or for consumers, excluding, however, services rendered in respect to live animals, birds and insects; (2) the constructing, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth to the extent necessary for such constructing or improving, unless the charge therefor is stated separately from other charges made in connection with the work performed, under such rules as the Tax Commission may prescribe.

The said term shall not include the sale of or charge made for labor and services rendered in respect to the mere cleaning, fumigating, razing, or moving of existing buildings or structures, or the building, repairing or improving of any publicly owned street, place, road, highway, bridge or trestle which is used or to be used primarily for foot or vehicular traffic, nor shall it include sales of feed, seed, fertilizer, and spray materials to persons for the purpose of producing for sale any agricultural product whatsoever, including milk, eggs, wool, fur, meat, honey or other substances obtained from animals, birds or insects.

(e) The term "sale at wholesale" or "wholesale sale" means any sale of tangible personal property and any sale of or charge made for labor and services rendered in respect to real or personal property, which is not a sale at retail;

(f) The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses;

(g) The term "gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments, however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses;

(h) The term "value proceeding or accruing" means the consideration, whether money, credits, rights or other property expressed in terms of money, actually received or accrued. The term shall be applied, in each case, on a cash receipts or accrual basis according to which method of accounting is regularly employed in keeping the books of the taxpayer. The Tax Commission may provide by regulation that the value proceeding or accruing from sales on the installment plan under conditional contracts of sale may be reported as of the dates when the payments become due;

* * * (Section 2, Chapter 228, Washington Laws of 1949.)

SEC. 6. Every person engaging in activities which are within the purview of the provisions of two or more paragraphs (a), (b), (c), (d), (e), (f), and (g) of section 4, shall be taxable under each paragraph applicable to the activities engaged in: *Provided, however,* That persons taxable under paragraphs (c) or (e) of said section shall not be taxable under paragraphs (a), (b) or (d)(2) of said section with respect to extracting or manufacturing of the products so sold. (Section 2, Chapter 5, Washington Laws of 1950, Ex. Ses.)

SEC. 7. The value of products, including by-products, extracted or manufactured shall be determined by the gross proceeds derived from the sale thereof whether such sale is at wholesale or at retail, to which shall be added all subsidies and bonuses received from the purchaser or from any other person with respect to the extraction, manufacture, or sale of such products or by-products by the seller, except:

(a) Where such products, including by-products, are extracted or manufactured for commercial or industrial use;

(b) Where such products, including by-products, are shipped, transported or transferred out of the state, or to another person, without prior sale or are sold under circumstances such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale.

In the above cases the value shall correspond as nearly as possible to the gross proceeds from sales in this state of similar products of like quality and character, and in similar quantities by other taxpayers, plus the amount of subsidies or bonuses ordinarily payable by the

purchaser or by any third person with respect to the extraction, manufacture, or sale of such products. The Tax Commission shall prescribe uniform and equitable rules for the purpose of ascertaining such values. (Section 3, Chapter 228, Washington Laws of 1949.)

SEC. 8. Any person rendering services and maintaining places of business both within and without this state shall, for the purpose of computing tax liability under this title, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state. (Section 5, Chapter 178, Washington Laws of 1941.)

SEC. 12. In computing tax there may be deducted from the measure of tax the following items:

* * *

(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

* * * (Section 3, Chapter 249, Washington Laws of 1945.)

SEC. 14. It is not the purpose of this title that the taxes herein levied upon persons engaging in business shall be construed as taxes upon the purchasers or customers, but it is the intention that such taxes shall be levied upon, and

collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons engaging in business. (Section 14, Chapter 180, Washington Laws of 1935.)